Nos. 76-1440, 76-6561 and 76-6579

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALEX GOLDSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

LEONARD NIKOLORIC, PETITIONER

v.

UNITED STATES OF AMERICA

MILES DEARDEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 546 F. 2d 622.[1]

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[1] "Pet. App." refers to the appendix in No. 76-6561.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1977. Petitions for rehearing and rehearing *en banc* were denied on March 17, 1977. The petitions for writs of certiorari were filed on April 14, 1977 (No. 76-6561), April 16, 1977 (No. 76-1440), and April 18, 1977 (No. 76-6579). No. 76-6579 is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence of other fraudulent activities by some of the conspirators in this case was relevant to prove the conspiracy charged, and whether petitioner Nikoloric was prejudiced by any error.

2. Whether petitioner Nikoloric's status as trustee of fraudulently obtained funds immunized him from criminal prosecution for transactions involving the transfer of those funds.

3. Whether the trial court abused its discretion in denying petitioner Goldstein's mid-trial motion to depose foreign witnesses.

4. Whether the prosecutor improperly commented on petitioner Goldstein's failure to testify.

5. Whether petitioner Dearden was improperly denied prior to trial copies of the voluminous documentary evidence he requested at the government's expense.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy to transport money obtained by fraud, in violation of 18 U.S.C. 371. Petitioners Nikoloric and Dearden were also convicted on seven and twelve counts of mail fraud, wire fraud, and interstate or foreign transportation of monies or securities converted or taken by fraud, in violation of 18 U.S.C. 1341, 1343, 2314 and 2. Petitioner Goldstein was sentenced to two years' imprisonment. Petitioners Nikoloric and Dearden were sentenced to concurrent terms of five years' imprisonment on the conspiracy count and two years' imprisonment on each of the substantive offenses.[2] The court of appeals affirmed.

The evidence showed that petitioners and others established a scheme to defraud investors in the First Liberty Fund, an offshore mutual fund, through the sale of worthless securities. Petitioner Dearden was a managing partner of the fund. Petitioner Nikoloric, who entered the scheme after its creation, assisted in the operation and management of First Liberty, and petitioner Goldstein was a partner in the sales organization that sold First Liberty securities. (Pet. App. 1329).

1. First Liberty Fund was formed in the Bahamas in late 1968 by Phillip Wilson, Jack Axelrod, Sam

[2] Miles Dearden, Sr., also was convicted on several counts. He did not appeal (Pet. App. 1329 n. 1).

Wilkenson, and others (Tr. 71).[3] Axelrod prepared and Wilkenson (who was not a certified public accountant) certified balance sheets reflecting that First Liberty's assets exceeded $26 million in January 1970 (G. Exh. 76) and $32 million in March 1970 (G. Exh. 80; Tr. 173). These figures were baseless. First Liberty's assets were all but valueless (Tr. 81, 172). In April 1970 petitioner Dearden became president and director of First Liberty (Tr. 93, 113).

To stimulate purchases of its shares, First Liberty entered into an agreement with Transcontinental Casualty Insurance Company ("Transcon") (Tr. 258–259) under which Transcon purportedly "guaranteed" all investments in First Liberty held for a period of three years. Transcon, however, had insufficient assets to underwrite these investments (Tr. 267).

In April 1970 Wilson learned that a European acquaintance, Jerry Lasky, had a sales force in Baden-Baden, West Germany, that was seeking a mutual fund to sell to its clients (Tr. 417). First Liberty and Lasky subsequently agreed that Lasky's sales organization, Northern U.S. Investors ("NUSI"), would sell First Liberty shares in Europe for a commission (Tr. 420–423). Petitioner Goldstein and co-conspira-

[3] "Tr." refers to the 11-volume transcript of the evidence at trial. "Tr. Cl." refers to the one-volume transcript of the closing arguments of the prosecutor and petitioner Goldstein's counsel. "G. Exh." refers to the government's exhibits introduced at trial. "M. Supp. R." refers to the government's motion to supplement the record, contained in volume 18 of the record in this Court.

tors Jurgen and Volker Reible were partners in NUSI (Tr. 434, 1113–1114, 2517).[4]

Petitioner Nikoloric, an attorney, came in contact with First Liberty in Germany while seeking financing for Cocein, a financially distressed Honduran lumber company of which he was president. He entered into an agreement in June 1970 by which First Liberty sales proceeds would be used to finance Cocein (Tr. 2403–2410). In August 1970 Nikoloric reached an agreement with a partnership that included key principals of First Liberty; under this agreement Nikoloric was to receive a $40,000 annual retainer, his expenses, and one-quarter of the venture's profits (Tr. 2130; G. Exh. 226C)

2. In late July 1970 petitioners, the Reible brothers, and officers of First Liberty met in Baden-Baden and discussed a plan for the sale of First Liberty shares to investors in a troubled mutual fund, Investors Overseas Service ("IOS"). The plan provided for a sales program by which IOS investors would redeem their IOS shares through a Zurich bank and purchase First Liberty shares instead, with the proceeds to be deposited in First Liberty's account at a Geneva bank (Tr. 500–501, 1121–1124, 1137).

After the July meeting, brokers were sent false financial statements of First Liberty and other false

[4] It was agreed that NUSI would receive a 22½ percent sales commission, in addition to Lasky's personal 10 percent commission, for all sales of First Liberty shares (G. Exhs. 222, 223; Tr. 423–424). The customary commission on European sales of offshore mutual funds was 8½ percent, with the highest being no more than 10 percent (Tr. 430).

or misleading information, including (1) a statement reflecting a nonexistent $1,697,000 profit by Cocein (G. Exh. 149J); (2) a balance sheet showing First Liberty's assets as exceeding $31 million (G. Exh. 85); (3) a statement describing First Liberty's annual growth rate as 72½ percent (G. Exh. 87); and (4) a prospectus published by First Liberty showing a $290 million net worth for Transcon, the insurance guarantor,[5] and $27 million in First Liberty assets (G. Exhs. 92, 231G). Investors relying upon this information purchased more than $1.8 million worth of First Liberty shares in the period through mid-December 1970 (Tr. 600–601, 1110–1111, 1138–1140, 1177–1183, 1318–1319, 1324–1327, 1329–1333, 1409–1414, 1448–1450, 1473).

In September 1970, after the Geneva bank holding the sales proceeds of First Liberty shares had closed the company's account, petitioners, the Reible brothers, and others discussed means (including issuance of a revamped financial statement) of persuading another bank to accept the some $600,000 in proceeds that had accumulated. At the same time Goldstein and the Reibles demanded a 40 percent commission for NUSI on future sales; petitioner Nikoloric and Richard Brandom, a First Liberty principal, acceded to the request (Tr. 575–578, 638–640, 1073–1074, 2554). When a Zurich bank accepted the First Liberty account, NUSI commissions amounting to $170,000 of

[5] Petitioner Nikoloric knew that Transcon had been unable to post a $100,000 guarantee in the London financial market (Tr. 458–459).

the initial $673,000 deposit were transferred to a numbered account, and petitioners implemented a plan to conceal the amount of future NUSI commissions from the bank (Tr. 617–623).[6]

Despite subsequent changes in the control of First Liberty, petitioner Nikoloric and NUSI continued to receive disbursements from the company as before (Tr. 681–684, 2221–2226, 2557–2558). Of more than $1.8 million in sales proceeds of First Liberty shares, NUSI (in which petitioner Goldstein was a partner) received nearly $700,000, petitioner Nikoloric received nearly $40,000, and Cocein (of which Nikoloric was a principal shareholder) received $220,000 (Tr. 2212, 2495–2496). With one minor exception, investors in First Liberty lost their money (Tr. 1198–1200, 1405–1406, 1416, 1457, 1469, 1474).

ARGUMENT

1. Petitioner Nikoloric contends (Pet. 10–22) that the proof at trial showed the existence of multiple conspiracies rather than the single one alleged in the indictment. Petitioner's argument was accurately characterized by the court of appeals (Pet. App. 1331–1332) as an objection to the evidence introduced at trial rather than as a contention that the proof showed multiple conspiracies.

Most of the evidence to which petitioner objects was relevant to the question whether petitioner Nikoloric

[6] As part of that plan, a substantial portion of the proceeds was routed to accounts in the name of petitioner Nikoloric in Washington, D.C., banks, from which they were forwarded to the numbered Swiss account (Tr. 620–623).

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took part in a conspiracy to defraud customers of First Liberty. The evidence showed either the fraudulent nature of that company or Nikoloric's knowledge of the fraud by the co-conspirators. Evidence was introduced, for example, to show fraudulent manipulation of the Bank of Sark by Axelrod and Phillip Wilson. The Bank of Sark, however, was listed on some of First Liberty's financial statements as the holder of $900,000 of its funds (G. Exh. 84, 92; Tr. 1943–1944). Evidence of the fact that the Bank of Sark was itself a fraud thus helped to demonstrate the nature of the deception engaged in by First Liberty.[7] Moreover, petitioner Nikoloric had been made aware in July 1970 of the unreliability of the persons operating the Bank of Sark (Tr. 455–458), and evidence of its practices was thus relevant to Nikoloric's knowledge of the fraud practiced by First Liberty.[8]

[7] At the time the Bank of Sark was represented to hold $900,000 in First Liberty assets, it had actual deposits totaling about $15,000 (Tr. 90). In similar fashion, holdings in Tangible Risk, Compreal Holding, Bethany Lodge, London and Wales, and Comutrix were listed as assets on First Liberty's balance sheets distributed in Europe, but they were either worthless or grossly overvalued in the statements (Tr. 86, 209, 247 ,1580–1614; G. Exhs. 89, 92, 98).

[8] In like manner, petitioner Nikoloric had been informed of the purchase of securities from another bank by petitioner Dearden at a greatly inflated price, in return for a bank account in which to deposit First Liberty sales proceeds (Tr. 670–674). Since these securities were then listed as a First Liberty asset (Tr. 673–674; G. Exh. 98), evidence of this transaction tended to show Nikoloric's knowledge of First Liberty's practice of inflating its assets. Dearden's action in purchasing the stock did not show the existence of a separate conspiracy; it was an act of a co-conspirator in furtherance of the conspiracy alleged. There was also evidence of other attempted or successful acquisitions of properties by Dearden, which were then listed as First Liberty assets, some at grossly inflated value (*e.g.*, Compreal Holding, Bethany Lodge) (Tr. 119–123, 1561–1614, 1852–1870; G. Exh. 3). These transactions too were admissible as acts of a co-conspirator in furtherance of the conspiracy.

The rest of the evidence that petitioner contends related to separate conspiracies involving institutions other than First Liberty (albeit involving some of the same conspirators) was elicited during defendants' cross-examination of government witnesses.[9] Petitioner Nikoloric evidently did not believe during trial that this evidence was prejudicial to him, since he did not object to its admission.[10] In any event, assuming that some of this evidence was inadmissible with regard to petitioner, we submit that he suffered no prejudice from it. Petitioner Nikoloric was no peripheral figure in the scheme to defraud investors in First Liberty; this was accordingly not a case "'where a minor participant in one conspiracy was forced to sit through weeks of damaging evidence' relating to others." *United States* v. *Bernstein*, 533 F. 2d 775, 793 (C.A. 2), certiorari denied, 429 U.S. 998; *United States* v. *Miley*, 513 F. 2d 1191, 1209 (C.A. 2), certiorari denied *sub nom. Goldstein* v. *United States*,

[9] *E.g.*, Frank Blosser was cross-examined about his connection with fraudulent schemes involving English and Israeli companies (Tr. 320–322), and Axelrod was questioned about his involvement in fraudulent activities for which he had pleaded guilty to criminal charges (Tr. 165–167, 189–190).

[10] Of the some 70 instances cited by petitioner as allusions to separate conspiracies, the record shows that he objected to only two (Tr. 89, 2019).

423 U.S. 842. Moreover, the trial judge thoroughly instructed the jury both during and after the reception of evidence that it was to treat each defendant separately and to consider only the acts of the individual defendant in determining whether he was a member of the conspiracy charged (*e.g.*, Tr. 68–69, 419–420, 3469–3470, 3492–3493). In these circumstances petitioner may not belatedly contend that he was prejudiced by evidence of "multiple conspiracies."

2. Petitioner Nikoloric's substantive convictions for wire fraud were based upon transfers of funds to and from two bank accounts in his name in Washington, D.C., banks. More than $900,000 in First Liberty sales proceeds had been deposited in these accounts. More than $240,000 was transferred from the accounts to the account of M. C. Dearden Associates in Florida, and more than $250,000 was transferred to a numbered Swiss bank account. Petitioner Nikoloric personally received $38,500 from the accounts (Tr. 2216–2220).

Petitioner Nikoloric contends (Pet. 36–40) that he was a "trustee" of First Liberty's funds, that he transported the sales proceeds in that capacity according to the instructions of the settlors, and that he was therefore not criminally liable for his acts.[11] At bottom petitioner's claim is that, although he knew First Liberty had obtained the funds in question by

[11] One of petitioner Nikoloric's accounts named him as a trustee, and he identified the accounts at trial as trust accounts (Tr. 2461). According to petitioner, disbursements from the accounts were made upon instructions from the Reibles and petitioner Dearden (*ibid.*).

fraud, he owed a higher duty to the settlors than he did to the criminal law. But a trustee has no duty to violate the law. ALI, *Restatement of the Law of Trusts* § 166, pp. 410–415 (1935); Scott, *Trusts* 271 (1967).[12]

3. Petitioner Goldstein contends (Pet. 8–14) that the district court erred in denying his mid-trial motion to depose Jurgen and Volker Reible, who were named in the indictment as defendants. The Reibles were fugitives in West Germany at the time of trial.

Petitioner filed a motion in January 1975 to take the depositions of 29 potential witnesses (R. 185, 195). The motion was denied for failure to make the required showing of need (R. 281–282). By February 1975 the prosecutor's exhibit file had been opened to petitioner's counsel for inspection and copying (R. 190–191, 209, 284–285, 426). In April 1975 petitioner Goldstein filed a supplemental motion to depose (R. 294). The court allowed depositions of 25 potential

[12] Petitioner's reliance (Pet. 38–39) on *Woodward* v. *Metro Bank of Dallas*, 522 F. 2d 84 (C.A. 5), is unwarranted. In *Woodward* the court considered the issue whether the defendant bank and its employee could be secondarily liable to an accommodation endorser under the securities fraud prohibitions of 17 C.F.R. 240.10b–5; the court found insufficient evidence of fraudulent knowledge to permit liability (522 F. 2d at 97–100). Petitioner seeks to analogize the facts of this case to those of *Woodward*. But petitioner conceded that he knew by October 1970 that First Liberty was a fraud (Tr. 2463). All but one of the transactions charged in the substantive counts on which he was convicted occurred after that date, and the conspiracy charge encompassed that period. Although the evidence was sufficient to show petitioner's guilty knowledge well before that date (see pages 3–7, *supra*), petitioner's own admission of knowledge further distinguishes this case from *Woodward*.

witnesses, primarily in West Germany, although the court noted that petitioner had shown the necessity of deposing less than half that number (R. 378–379). Although he had not moved to depose them, petitioner's counsel interviewed the Reibles about the case while in West Germany (R. 418–419).[13]

Trial began on June 25, 1975. Petitioner Goldstein moved two weeks later to recess the trial and to depose Jurgen and Volker Reible (R. 552). Attached to this motion was a statement of Volker Reible that the brothers would be willing to testify by deposition in the Bahamas if assurances of free passage in the United States could not be given (R. 554–555). The court denied the motion, concluding that it was untimely (R. 426–427; Tr. 1814–1817).

The court of appeals correctly held that the denial of the mid-trial motion was not an abuse of discretion. Petitioner Goldstein had been afforded broad discovery and full opportunity to seek depositions of the Reibles prior to trial. In denying the motion the district court observed (R. 427):

> Every possible consideration and advantage for gathering evidence and preparing for trial has heretofore been accorded Goldstein and his counsel by both counsel for the government and the Court.

Moreover, petitioner's counsel interviewed the Reibles when in West Germany. Petitioner and the Reibles were co-defendants and significant figures in the

[13] According to petitioner's counsel, the prosecutor declined his suggestion to depose the Reibles, and the Reibles refused to give sworn or written statements (R. 418).

scheme alleged in the indictment. The significance of their testimony, if any, to petitioner Goldstein should have been apparent well in advance of trial. Petitioner's failure to move to depose the Reibles until the third week of trial amply justified the court's denial of the motion for undue delay. *United States* v. *Whiting*, 308 F. 2d 537, 541–542 (C.A. 2), certiorari denied, 372 U.S. 919; see *United States* v. *Leon*, 441 F. 2d 175, 178 (C.A. 5).

Petitioner maintains (Pet. 13) that the delay was excusable because he did not know the theory of the government's case until after its case-in-chief. The district court, however, observed (Tr. 1815):

> [N]o one with any intimate knowledge of this case could possibly avoid knowing the situation that we have today insofar as the state of the evidence that would exist.

Petitioner's claim that the delay was excusable is thus groundless.[14]

4. Petitioner Goldstein contends (Pet. 14–16) that the prosecutor improperly commented on his failure to testify at trial.

During closing argument the prosecutor stated:

> Did Goldstein say, "Hey, stop, no more sales?" Did he say "Let's freeze the money, all

[14] Petitioner relies on *United States* v. *Bronston*, 321 F. Supp. 1269 (S.D. N.Y.). In *Bronston* the court granted a motion to depose foreign witnesses submitted more than three weeks prior to trial, although the court noted that the motion was dilatory (321 F. Supp. at 1273). But there is a world of difference between pretrial motions and mid-trial motions; *Bronston* does not indicate that no motion to depose may be denied as untimely.

money coming in and hold it for the benefit of the First Liberty Fund shareholders?" No, he did not do that. [Tr. Cl. 22.]

* * * * *

Now, what did Mr. Goldstein and the others do. Well, they didn't tell Riegler. [Tr. Cl. 69.]

* * * * *

Mr. Goldstein met with Mr. Mattauch before the Frankfort meeting. He never told Mr. Mattauch about First Liberty being a fraud. [Tr. Cl. 69.]

* * * * *

They never told anyone [that First Liberty was a fraud], ladies and gentlemen. [Tr. Cl. 69.]

Those comments have nothing whatever to do with petitioner Goldstein's failure to testify. On the contrary, they relate only to evidence of his conduct during the course of the fraudulent scheme, and they were therefore proper. They relate to Goldstein's dealings with investors, not to his defense at trial.

The prosecutor further commented (Tr. Cl. 67): "Mr. Goldstein is trying to say that he is so naive * * *." The statement was a proper response to the evidence presented by petitioner Goldstein in an effort to show that he was unaware of the fraudulent nature of First Liberty (Tr. 3119–3120, 3210–3211). The comment did not allude to petitioner's failure to testify.

Finally, the prosecutor observed (Tr. Cl. 128):

> There is no evidence in this case, one way or the other, as to who had the power to sign the checks on this NUSI account at the Swiss bank corporation, and there is no evidence in this case one way or the other as to what happened to the money that was in that account.

During closing argument, petitioner Goldstein's counsel had argued that the Reible brothers had exclusive control of the numbered Swiss bank account to which certain First Liberty sales proceeds were transferred (Tr. Cl. 103).[15] The prosecutor's remark was a direct and proper response to that argument. Moreover, as the court of appeals observed (Pet. App. 1331), the remark was in the nature of a comment on the failure of the defense; it did not ask the jury to draw any inference from petitioner's failure to testify.

5. Petitioner Dearden contends (Pet. 5–8) that he was entitled to receive prior to trial copies of the government's proposed documentary evidence at government expense.

Petitioner's counsel, Theodore Klein, was appointed more than seven months prior to the June 1975 trial. By mid-December 1974, Klein had received voluminous *Jencks* material and was advised that the documentary evidence was available for inspection (R. 181–182, 278–280, 488).[16] On February 6, 1975, petitioner sought reimbursement of almost $500 as expenses incurred in copying some 4500 pages of the material (R. 234–235, 458). That application was granted (R. 380).

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[15] Petitioner Nikoloric had testified that the Reibles told him that the Swiss account was theirs (Tr. 2487).

[16] Throughout the pretrial period the prosecutor continuously provided updated *Jencks* material, proposed lists of exhibits, and tentative lists of documents to be offered by each witness (R. 209, 234–235, 249–250, 255–276, 284–289, 496, 582–600).

Petitioner also requested advance payment of the cost of copying the documentary evidence; Klein stated that it was needed for trial preparation (R. 234–240). Arrangements had been made for co-defendants to obtain copies of the material, and the estimated cost of copying the approximately 15,000 pages was between $1,000 and $1,500 (R. 235). A hearing was held the following day; Klein stated that he needed copies of the material regardless of its availability from other sources (R. 460–461). The district court stated that it had contacted the attorney for petitioner's father, co-defendant Miles Dearden, Sr., who had agreed to lend his copies of documents in blocks to Klein so that he could use it in his own office (R. 464). The court observed that funds for the kind of expenditure sought by petitioner were very limited (R. 462–464, 469). Approximately ten days later the prosecutor informed Klein by letter that he would make all reasonable efforts to allow him to study the materials. The prosecutor stated that Klein could come to his office as often and as long as necessary for that purpose, and that a private area would be provided in which Klein could go over the materials with his client (M. Supp. R. Exh. A).

In April 1975 the court, responding to Klein's subsequent motion to have the material copied, requested reasons why the arrangement to obtain copies of the materials from co-defendant's counsel was unsatisfactory. The court also stated (M. Supp. R. Exh. B):

> If adequate representation of your client demands that you receive copies of all this material, will you please advise by whom the copies will be made, the mode of copying * * *; and if this additional expense must be incurred, please made every reasonable effort to obtain it as economically as possible.

The court asked for a more definite statement of cost and concluded by offering to enter an appropriate order upon further report for counsel (*ibid.*). A few days later the prosecutor noted in a letter to Klein that they were to meet to review the materials and determine what Klein wanted copied (M. Supp. R. Exh. C). Klein took no further action, either with regard to the district court's request and offer to authorize the expenses or with regard to the prosecutor's offer to provide assistance when more specifically advised of the particular documents Klein sought to copy.

Under these circumstances, petitioner was not penalized by his inability to afford copying costs. Although the documentary evidence was voluminous, petitioner's counsel was afforded access to it both in his own office and at the United States Attorney's office with provision for private consultation there with his client. Moreover, petitioner did nothing after the court offered to authorize the requested expenditure. Finally, petitioner's counsel effectively utilized the documentary evidence at trial (*E.g.*, Tr. 827–829, 1206–1208, 1615, 1879, 1883, 2039, 2473, 2475–2479). Accordingly, petitioner's claim that he was denied materials necessary for trial preparation is insubstantial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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